Supreme Court, U.S.
FILED
AUG 4 1992
OFFICE OF THE CLERK

(2)

No. 92-70

IN THE

Supreme Court of the United States

October Term, 1992

UNITED STATES STEEL CORPORATION,
Petitioner,

v.

ANDREW CARTER, A MINOR BY HIS PARENT AND NATURAL GUARDIAN, DONALD CARTER and DONALD CARTER IN HIS OWN RIGHT,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE ISSUES INVOLVED

I. Should the Petition for Writ of Certiorari be denied because the judgment which USX seeks to have reviewed by this Court rests upon adequate and independent state law grounds?

II. Should the Petition for Writ of Certiorari be denied because USX did not assert that a new trial was required by the Fourteenth Amendment at any stage of the proceedings in the state courts below?

III. Does the Fourteenth Amendment require that a defendant in a state civil action for negligence be granted a new trial even though the state court of last resort determined that the publicity which is the basis for the requested relief was not prejudicial?

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COUNTERSTATEMENT OF THE CASE

Because the Petition for Writ of Certiorari neither accurately nor completely sets forth the material facts of record, Respondents submit the following counterstatement of the case.

* * *

This civil action for money damages was tried to a jury in a Pennsylvania trial court under Pennsylvania negligence law. On June 1, 1984, 14-year-old Andrew Carter climbed a high-voltage electrical tower located at Petitioner's (USX's) abandoned "Carrie Furnace" facility. Carter, who thought the electricity to the tower had been shut off, contacted a high-voltage electrical line and was severely burned. On the basis of Pennsylvania tort law, USX was held liable for Carter's injuries, and money damages were assessed. This amount was reduced in accordance with Pennsylvania's Comparative Negligence Act for Carter's contributory negligence.

Five days before jury selection, an article appeared in Pittsburgh's evening newspaper (*Pittsburgh Press*) concerning a lawsuit filed against USX by the parents of a 16-year-old who was electrocuted while climbing a tower in the Carrie Furnace plant. This incident occurred after Carter's injury. The article indicated that Orlando Dudley, the victim, died while attempting to steal copper wire from the plant and that USX declined comment on the lawsuit. Although USX was aware of this publicity regarding the subsequent accident at its Carrie Furnace plant at the time of jury selection in the *Carter* case, it did not conduct *voir dire* on the subject or request cautionary instructions regarding the publicity when trial began.

On the final day of the *Carter* trial, an article appeared in a suburban edition of a morning newspaper, *The Pittsburgh Post-Gazette*, regarding the lawsuit brought as a result of the subsequent accident. The article described the circumstances involving Orlando Dudley's death, stated that the Carter case was being tried, and quoted USX's Manager of Public Affairs on the subject of electrocution accidents at its abandoned Carrie Furnace plant. It was later determined that the author of the article had contacted USX's Manager of Public Affairs the day before publication to discuss the ongoing Carter trial and the lawsuit for the subsequent accident, and had informed him that she was preparing an article on the subject. (Petition for Cert., App. 16). USX's representative openly discussed both cases with the reporter. (*Id.*).

Although this article was published before the final day of trial, at no time during the day did USX request cautionary instructions, or otherwise call the publicity to the trial court's attention. The jury commenced deliberations in the afternoon, and was sent home after having completed two hours of deliberations. USX did not request cautionary instructions when the jury was discharged for the day.

USX first mentioned publicity of the subsequent accident the following morning. (Petition for Cert., App. 113). At that time, counsel for USX gave the trial judge a copy of the *Post-Gazette* article which appeared the previous morning, and stated: "We should probably bring to your attention" the *Press* article published two weeks earlier. (*Id.*). USX's counsel also informed the court that the Carter trial had been mentioned on a local television newscast the previous evening, during a brief story which summarized the *Post-Gazette* article. (*Id.*).

USX's counsel then recommended that the trial judge question each juror, *after the verdict*, as to whether the juror had read the *Post-Gazette* article regarding the subsequent accident. (Petition for Cert., App. 116). No request that the jury be given cautionary instructions was made. USX later conceded that its desire to have the jury continue deliberating to verdict without cautionary instructions was a tactical decision based on its belief that "an instruction to disregard any publicity which may or may not have been seen would have risked drawing undue attention to the matter . . ." (Brief in Support of Motion of United States Steel Corporation for Post-Trial Relief, pp. 8-9).

The jury unanimously[1] found USX liable for Carter's injuries. Over Carter's objection, the trial court then employed the procedure which USX had recommended. Each juror was summoned into chambers individually and interrogated by counsel for USX and the trial judge as to their awareness of publicity about the subsequent accident, discussion of the publicity among the jurors during deliberations, and its effect on their deliberations. (Petition for Cert., App. 122-138).

The questioning revealed that none of the jurors had read the newspaper article (*Id.*). Two jurors stated they had seen the television news story on the lawsuit arising from the subsequent accident. (Petition for Cert., App. 127, 133). Other jurors revealed that the broadcast had been discussed during deliberations. (Petition for Cert.,

[1] USX erroneously states that the verdict in this case was 11-1 (Petition for Writ of Cert., p. 8, n.3.) Its only basis for this statement is a post-verdict comment of a juror, which did not specify which of the five issues on which the jury voted was being referred to. USX did not request a poll of the jury, and the record therefore properly reflects a unanimous verdict for the plaintiff. *Commonwealth v. Jackson*, 457 Pa. 237, 324 A.2d 23 (1971); *Havranek v. Pittsburgh*, 344 Pa. 237, 324 A.2d 23 (1971).

App. 122). Two jurors[2] stated that their "opinions" changed after these discussions, but contrary to USX's misstatements, they did not indicate in what respect or on which issues their opinions had changed.[3] (Petition for Cert., App. 127, 133).

Following the verdict, USX filed a Motion for Post-Trial Relief, requesting a new trial or Judgment Notwithstanding the Verdict. Though the Motion asserted numerous trial errors and contended that the publicity of the subsequent accident had prejudiced the jury, no due process or other constitutional grounds were raised. The trial court granted USX a new trial on grounds that the publicity of the subsequent accident was "prejudicial." On appeal, a panel of the Superior Court of Pennsylvania reversed, holding that the post-verdict interrogation of the jury was an impermissible intrusion into the secrecy of its deliberations. The Superior Court condemned the process as a violation of a Pennsylvania rule prohibiting judicial consideration of post-verdict juror statements, and reversed the grant of a new trial.

[2] As with much of its Statement of the Case, USX's characterization of Juror #10's post-verdict statements is inaccurate. Juror #10 stated that he voted differently after "hearing about the tower." (Petition for Cert., App. 135).

[3] The jury's task during deliberations was to answer written interrogatories on the issues of negligence, contributory negligence, causation, and damages. There were five separate issues which the jury had to decide, and USX's presumption that the juror's post-verdict statements referred to the issue of liability is a mischaracterization of the record. The two jurors stated only that they had "changed their opinion" and "changed their vote", and gave no indication as to what issue they were referring to. USX's description of their response to the interrogation as, "blurt[ing] out they had been unable to reach a verdict based on the evidence of record after being exposed to the news account (Petition for Cert., p. 9)" is a misrepresentation of the record.

USX requested reargument before the Superior Court of Pennsylvania, *en banc*, which was granted. Again, USX did not raise due process or any other constitutional issue. The Superior Court subsequently issued three separate opinions, with three judges voting to award USX a new trial on grounds that the publicity of the subsequent accident was prejudicial, and three judges voting to reverse the new trial award. Both opinions condemned the post-verdict interrogation of the jurors as an improper intrusion into the deliberative process.

The Supreme Court of Pennsylvania accepted the case for discretionary review. In accordance with the rules of the Supreme Court of Pennsylvania, a statement of the issues for appeal was filed by each party. No due process or other constitutional issue was raised by USX. A complete record of the trial court proceedings, which included a videotape copy and transcript of the involved television broadcast, was filed with the Supreme Court of Pennsylvania. Under the Pennsylvania Rules of Appellate Procedure, USX had an opportunity to supplement this record with any materials which it deemed pertinent to the issues on appeal.

The issues raised by the appeal were extensively briefed by the parties. Again, USX's brief neither raised nor discussed a constitutional issue. At oral argument before all Justices of the Supreme Court of Pennsylvania, USX did not advance any contention that due process required the grant of a new trial. Following the argument, USX also submitted a supplemental "letter brief", which again did not advance any constitutional issue.

On March 6, 1992, the Supreme Court of Pennsylvania issued a decision reversing the grant of a new trial. USX's Statement of the Case misstates both the court's holding and the basis for its decision. The Supreme Court of Pennsylvania did not, as USX asserts, "make its own set of factual findings." (Petition for Cert., p. 11). On the contrary, the appellate court considered the television broadcast, the content of which was undisputed, and concluded that it was an accurate account of an unrelated accident which was not prejudicial.[4]

USX has carefully avoided any reference to the other grounds for the decision of the Supreme Court of Pennsylvania. In addition to concluding that publicity about the second accident was not prejudicial, the court held that since the record established that USX participated in the process of generating publicity about the subsequent accident, it was ". . . now estopped from legitimately complaining that they have been prejudiced by the jury's awareness of that publicity." (*Id.*, App. 17). In addition, the record revealed that USX made a tactical decision to refrain from calling the publicity to

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[4] USX's statement that the Pennsylvania Supreme Court "announced" a new standard for determining prejudice in Pennsylvania" inaccurate. The opinion clearly states that the standard for determining whether or not a jury in a Pennsylvania case was prejudiced by an extraneous influence, from whatever source, is always the same. The standard, which is applied objectively, is whether there is a "reasonable likelihood of prejudice." Considerations relevant to making this determination include: whether the extraneous influence relates to a central or collateral issue in the case, whether the extraneous influence provided the jury with information they did not have before them at trial, and whether the extraneous influence was emotional or inflammatory in nature. (Petition for Cert., App. 13).

the court's attention until the jury had deliberated for two hours, and then elected to receive the verdict without requesting cautionary instructions. Regarding this conduct, the court stated, "A party may not remain silent and take his chances on a verdict and then complain if it is adverse." (*Id.*).

The alleged due process issue arose only after USX realized that it had lost this case in the Supreme Court of Pennsylvania. In an effort to circumvent its failure to raise a federal question in the state courts, USX asserts that, "The true due process violation did not occur, however, until the Pennsylvania Supreme Court rendered its decision and by-passed the trial court's ruling of prejudice and order of a new trial." (*Id.*, p. 13). Significantly, USX never asserted in the Supreme Court of Pennsylvania that the court lacked appellate jurisdiction to review the grant of a new trial in this case or that the issues which it ultimately decided were otherwise not cognizable on appeal.

SUMMARY OF THE ARGUMENT

USX's Petition for Writ of Certiorari should be denied because the decision of the Supreme Court of Pennsylvania is based on adequate and independent state law grounds. The court held that USX was precluded from asserting that the publicity was prejudicial because USX participated in generating the publicity and elected to receive the verdict without requesting that the jury be given cautionary instructions. This holding rests upon the application of well-settled Pennsylvania law, and, accordingly, this Court, under its longstanding policy against reviewing state court judgments which rest upon adequate and independent state law grounds, should deny consideration of the alleged due process issue which USX raised for the first time after it lost the case in the Supreme Court of Pennsylvania.

The Pennsylvania Supreme Court decision does not address any issue of federal constitutional law because no constitutional issue was ever raised in the courts below. The decision does not conflict with prior decisions of this or any other state or federal court on an important issue of federal law, and therefore presents no special or important question warranting exercise of this Court's certiorari jurisdiction.

Even if USX's due process argument had been raised in the state courts, it would be without merit because the court below properly found that the involved publicity was not prejudicial. Since the jury was not exposed to any information which can reasonably be characterized as prejudicial, there is no basis for USX's claim that the Fourteenth Amendment mandates the grant of a new trial.

ARGUMENT

REASONS FOR DENYING THE PETITION

I. This Court should deny the Petition for Writ of Certiorari because the judgment rests upon adequate and independent state law grounds, the alleged federal constitutional issue was never raised below and is without merit since the state court below properly concluded that the involved publicity was not prejudicial.

A. This Court should deny consideration of the alleged due process issue since the judgment rests upon adequate and independent state law grounds.

In addition to determining that the involved publicity was not prejudicial, the Supreme Court of Pennsylvania held that USX could not receive a new trial since it participated in generating the publicity, counsel for USX delayed raising the publicity issue until after the jury had completed two hours of deliberations, and then elected to receive the verdict without requesting cautionary instructions. This determination results from the application of well-settled principles of *Pennsylvania* law. In accordance with a long line of this Court's decisions,[5] the judgment in the within matter is not subject to this Court's review since it rests upon adequate and independent state law grounds. The Carters respectfully submit that this is a sufficient basis for denial of USX's Petition for a Writ of Certiorari.

The rule that this Court will not review a state court judgment which rests upon an adequate and independent state ground derives from the Court's longstanding

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[5] *See, e.g., Murdock v. Memphis*, 87 U.S. 590 (20 Wall. 592, 1875); *McCoy v. Shaw*, 277 U.S. 302 (1928); *Fox Film Corp. v. Muller*, 296 U.S. 207 (1938).

policy against issuing advisory opinions. As explained by Justice Jackson in *Herb v. Pitcairn*, 324 U.S. 117 (1935):

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. . . . Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

324 U.S. at 125-125 (*citations omitted*).

In the within case, the Pennsylvania Supreme Court held that USX's conduct precluded it from receiving a new trial. This holding is entirely independent of the determination that the publicity was *not* prejudicial, which USX contends involves a due process issue warranting this Court's review. It is readily apparent from review of the opinion that the Pennsylvania Supreme Court's decision is based on these additional state law grounds:

> The following factors are also relevant in determining whether USX should have been awarded a new trial. On February 11, 1987, while the case was still being tried, USX consented to a telephone interview with a reporter who was writing the article which appeared in the Pittsburgh Post Gazette on February 12, 1987. We do not doubt that counsel for USX was "surprised and chagrined" . . . by the appearance of the article, but we cannot impute the same surprise to their client. Having participated in the process of generating the publicity about the second accident at the Carrie

> Works, USX is now estopped from legitimately complaining that they may have been prejudiced by the jury's awareness of the publicity.
>
> * * *
>
> Additionally, . . . [w]hen the trial judge refused to conduct an immediate polling of the jury, deciding instead to "let the matter roll", counsel for USX seemingly acquiescing, made no objection nor did he request any alternative such as issuing cautionary instructions to the jury. . . . Finally, when the trial judge advised counsel for USX that the publicity issue could become moot if USX got a favorable verdict, the response by counsel for USX constituted assent to the trial judge's decision to take a wait and see attitude toward the verdict. Again, USX is estopped from legitimately complaining.

Opinion of the Supreme Court of Pennsylvania, (Petition for Cert., App. 16-17).

Each of these alternate bases for the decision result from the application of well-settled principles of law consistently applied by Pennsylvania's appellate courts. Pennsylvania's appellate courts have long recognized a party's obligation to *immediately* bring to the trial court's attention any publicity which the party asserts may be prejudicial, and that failure to do so precludes a request for a new trial based on the publicity. *Commonwealth v. Clay*, 56 Pa.Super. 427 (1914). Similarly, Pennsylvania's appellate courts have consistently applied the rule that a party who participates in exposing the jury to an allegedly prejudicial matter may not receive a new trial based on the event. *Ellsworth v. Lauth*, 311 Pa. 286, 166 A. 855 (1933).

USX participated in generating publicity about the subsequent accident during the Carter trial to a point where its Manager of Public Affairs was quoted in a newspaper article characterizing the cases as "similar". Much of the resulting publicity was unfavorable *to the plaintiff* since it implied that Carter's purpose in entering the mill was to steal valuable supplies. USX assumed the risk of publicity reaching the jury when it openly discussed this case with media representatives during trial.

Similarly, its failure to promptly notify the trial court when USX learned that publicity about the Carter case and the subsequent accident was imminent was properly held to constitute a waiver of any claim of prejudice. Despite knowledge several days in advance that a detailed news account discussing the Carter case and the subsequent accident would be published, USX never raised the matter with the trial court until after the jury had completed two hours of deliberations. Significantly, the trial judge stated that he would have taken steps to insure that the jury was not exposed to any publicity regarding the case if he had known the newspaper article would be published. (Petition for Cert., App. 117-118).

Upon learning of the publicity, counsel for USX did not request cautionary instructions. In its briefs filed in the state courts, counsel for USX explained this failure as a desire to "avoid drawing undue attention to the matter". *Brief in Support of Motion for Post-trial Relief,* pp. 8-9). However, counsel for USX suggested the procedure adopted by the trial court whereby the jury would continue deliberations without cautionary instructions and USX would be permitted to inquire whether any juror was exposed to the news items

only if a verdict was returned for the plaintiff.[6] This demonstrates that USX had elected to gamble on a defense verdict, and wished to hold the publicity issue in reserve in the event of an unfavorable verdict.

A long line of Pennsylvania appellate decisions hold that a party may not gamble on a verdict and later seek a new trial based upon an allegedly prejudicial occurrence during trial. *Tagnani v. Lew*, 493 Pa. 371, 426 A.2d 595 (1981); *Commonwealth v. Mehlman*, 163 Pa.Super. 534, 63 A.2d 400 (1949); *Pratt v. Stein*, 298 Pa.Super. 92, 444 A.2d 674 (1982). The Pennsylvania Supreme Court concluded that this is precisely what USX did in the present case, and properly held that its decision to receive a verdict without requesting cautionary instructions barred it from receiving a new trial under these applicable state law decisions.

USX completely ignores these alternative state law grounds, and fails to address decisions of this Court which preclude certiorari in such situations. Because the decision of the Supreme Court of Pennsylvania rests upon bona fide state law grounds entirely independent from the holding that the publicity was not prejudicial, it is respectfully submitted that this Honorable Court should deny further consideration of USX's Petition. *Herb v. Pitcairn, supra.*

B. The Petition should be denied because no federal constitutional issue was raised by USX in the state courts below.

This Court has repeatedly held that the federal issues must first be presented to the state courts to be preserved for review on writ of certiorari. *Pickering v.*

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[6] *See, Transcript of In-chambers Proceedings,* Petition for Cert., App. 116.

Board of Ed. of Township High School Dist. 205, Will County, Illinois, 391 U.S. 563 (1968); *Webb v. Webb*, 451 U.S. 493 (1981). This rule is founded upon important considerations of comity, which dictate that state courts must first be afforded an opportunity to consider challenges to official state acts based upon the federal constitution before this Court will review the decision. *Webb*, 451 U.S. at 499-500.

Due to these important policy considerations, this Court has stated that the record from the state court must *plainly* show that a federal issue was raised and considered in the state courts before this Court will grant review of the state court judgment. *Id.*, pp. 501-2. More recently, this Court held that mere general references to the Constitution are insufficient to preserve constitutional issues for review on writ of certiorari, stating:

> A party may not preserve a constitutional challenge by generally invoking the Constitution in state court and awaiting review in this Court to specify the constitutional provision it is relying upon.

Banker's Life Ins. Co. v. Crenshaw, 486 U.S. 71, 77 (1988).

This Court's procedural rules are equally clear that alleged federal issues must be presented to the state court to preserve an issue for Supreme Court review. Specifically, any party seeking review of a state court judgment must:

> . . . specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; with such pertinent quotation of specific

> portions of the record where the matter appears . . . *as will how that the federal question sought to be reviewed was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari.*

U.S. Sup. Ct. Rule 14.1 (h) (*emphasis added*).

Review of USX's post-trial motions filed in the trial court and its subsequent briefs and petitions demonstrates that no federal constitutional issue was ever presented to any state court at any stage in the proceedings. Similarly, USX's claim that the Fourteenth Amendment requires that it be granted a new trial was not considered or discussed in any of the opinions of the courts below. USX first raised the issue in its Petition for Writ of Certiorari. In accordance with the applicable rules and decisions of this Court, it is respectfully submitted that this Honorable Court should deny review of the within judgment since USX did not raise any federal constitutional issue in the state courts.

C. Neither the record nor applicable precedent supports USX's claim that it was denied due process of law by the Supreme Court of Pennsylvania.

In an attempt to avoid the consequences of its failure to raise any constitutional issue in the state courts, USX argues that the claimed denial of its due process rights occurred when the Pennsylvania Supreme Court held that the publicity at issue was not prejudicial. USX contends that the Fourteenth Amendment required that the Pennsylvania Supreme Court order a new trial or, in the alternative, accept the trial judge's conclusion as to whether the publicity was prejudicial.

USX does not cite any authority which holds that the Fourteenth Amendment requires a state appellate court to accept a trial court's finding of prejudice. This Court

does not recognize similar constitutional limitations on its scope of appellate review over decisions by the federal district courts. For example, in *Marshall v. United States*, 360 U.S. 310 (1959), this Court reversed a federal district trial court's finding that a news article was not prejudicial. The Court independently reviewed the content of the publicity and reversed the trial court's finding, noting that its power to do so arises from its "supervisory authority" over the federal district courts. 360 U.S. 313.

The Pennsylvania Supreme Court exercises similar supervisory authority over state trial courts, and routinely conducts independent reviews of trial judges' determinations as to whether matters arising during trial justify the award of a new trial. *See, e.g., Commonwealth v. Santiago*, 465 Pa. 265, 318 A.2d 737 (1974); *Commonwealth v. Williams*, 514 Pa. 62, 522 A.2d 1058 (1987). The determination of whether to grant or refuse a new trial is a question of law which is appropriately subject to review by a state appellate court. Just as this Court is not constitutionally powerless to review the grant or refusal of a new trial by the district courts, the Pennsylvania Supreme Court's exercise of its supervisory authority does not violate due process rights.

USX was afforded a full and fair opportunity to challenge the jury verdict against it. It was permitted to conduct a post-trial jury interrogation to discover whether any juror was aware of the publicity. It filed post-trial motions challenging the verdict pursuant to Pennsylvania's Rules of Civil Procedure, submitted briefs and participated in oral argument on its motions in the trial court, and subsequently before three separate appellate courts.

This Court, in the context of reviewing a state court criminal judgment in which the defendant claimed that due process required a new trial due to juror misconduct and partiality, held that a post-trial inquiry to determine whether a new trial was required adequately protected the defendant's Fourteenth Amendment rights. *Phillips v. Smith*, 455 U.S. 209 (1982). In *Phillips*, the Court noted that since a post-trial hearing to consider a claim of juror bias is constitutionally sufficient in the federal system, "... the Due Process Clause of the Fourteenth Amendment cannot possibly require more of a state court system." 455 U.S. at 218. It follows, therefore, that procedures sufficient to afford due process in a criminal trial are adequate for a state civil trial.

There is no conceivable violation of due process by the Pennsylvania Supreme Court's consideration or resolution of the within matter. USX's assertions to the contrary are merely an attempt to avoid the consequences of its failure to preserve an issue for this Court's review, and are advanced without citation or discussion of any relevant authority. Accordingly, it is respectfully submitted that USX's Petition does not present any federal question, much less a special and important federal question which would merit this Court's consideration.

D. USX's claim that the Fourteenth Amendment requires a new trial is without merit since the court below properly concluded that the publicity was not prejudicial.

Even if USX had raised a Fourteenth Amendment issue concerning the jury's exposure to the publicity in the state courts, the claim would be groundless since the Supreme Court of Pennsylvania gave thorough consideration to the contention and found that the

publicity was not prejudicial. USX's dissatisfaction with this holding does not make the decision unconstitutional or create a basis for this Court's review.

The involved newscast was a brief, accurate account of the filing of an unrelated lawsuit. As the Pennsylvania Supreme Court determined, it contained no new information about the Carter case not already known to the jury. *See,* Petition for Cert., App. 15. The only reference to the Carter case was a statement that a lawsuit was ongoing, and a reference to the fact that USX did not take precautions to prevent others from climbing the tower after Carter's accident.

This was not new information to the jury. At trial, USX admitted that safety precautions to prevent the accident were feasible, but argued to the jury that they were unnecessary since the danger of climbing the involved transmission tower was obvious. The jury saw numerous photographs of the tower, visited the scene on a court-approved view, and was aware that USX had not taken precautions to prevent access to the tower. Of course, this was entirely consistent with USX's trial posture that barricades or warnings were unnecessary, and that Carter's injuries were caused by his own negligence in climbing the tower.

The Pennsylvania Supreme Court concluded that the information concerning the subsequent accident was not conveyed in an inflammatory manner and did not require a new trial because the jury was instructed to base its verdict solely on the law and evidence presented in court.[7] This conclusion is understandable since the subsequent accident was admissible evidence under

[7] *Opinion of Pennsylvania Supreme Court,* Petition for Cert., App. 16.

Pennsylvania law. *Yoffe v. Pennsylvania Power & Light Co.*, 385 Pa. 520, 123 A.2d 636 (1956), holds that evidence of a subsequent accident is admissible to show that a dangerous condition was not obvious to a plaintiff.

This Court has held that not every exposure of a juror to extraneous information requires a new trial as a matter of constitutional law. *Rushen v. Spain*, 464 U.S. 114, *reh'g denied*, 465 U.S. 1055 (1984). In *Rushen*, this Court held that where a state court finds that a juror was exposed to extraneous information and communicated the information to other jurors, but determines that the information was not prejudicial, the refusal to award a new trial is not unconstitutional. Similarly, since the state court in the present case determined that the publicity was not prejudicial, the Fourteenth Amendment does not require a new trial.

USX's reliance upon *Remmer v. United States*, 347 U.S. 227 (1954) is misplaced. *Remmer* involved a federal criminal trial in which an unidentified individual contacted and attempted to bribe a juror in exchange for a vote for acquittal. The rule established there, which USX erroneously asserts is applicable in the present case, is that improper contacts with jurors by *third persons* are presumed to be prejudicial. No such contact occurred in the present case. Moreover, *Remmer* holds that a hearing to determine prejudice is all that is required by the Fourteenth Amendment, which USX received in the instant case.

USX's reliance upon *Mattox v. United States*, 146 U.S. 140 (1892) is also misplaced. *Mattox* involved another improper contact calculated to influence the jury; in that instance by a court bailiff. The information at issue in that case was of a type uniformly held inadmissible for

any purpose in murder prosecutions due to its non-probative and highly inflammatory character. In contrast, the information in the present case was either admissible evidence or already known to the jury, and was not conveyed by an individual attempting to influence the verdict.

All issues which were raised by USX in the state courts received full and careful consideration. The Supreme Court of Pennsylvania, after thorough review of the record and the contents of the involved publicity, determined that it did not warrant the grant of a new trial and held that USX's conduct precluded it from obtaining the relief it requested. No federal constitutional issue was ever raised or considered by the state courts. While this alone is sufficient reason to deny the Petition, it further presents no special or important issue warranting this Court's review. Accordingly, it is respectfully submitted that USX's Petition should be denied.

CONCLUSION

For the above-stated reasons, it is respectfully requested that this Honorable Court enter an Order denying USX's Petition for Writ of Certiorari to the Supreme Court of Pennsylvania.

Respectfully submitted,

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